Supreme Court of the United States

October Term, 1946.

No. 1225.

JOHN J. CASALE, INC.,
Petitioner,

AGAINST

LOREN SKIDMORE, *et al.*,
Respondents.

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JOSEPH MOONEY, *et al.*,
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Respondents' Brief in Opposition to Petition For Writ of Certiorari.

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Statement of Matter Involved.

The petition for certiorari outlines the facts in a fragmentary manner, and in certain respects distorts the contents of the appeal record. We believe a more comprehensive, yet succinct, presentation will assist materially in the consideration of the application.

Summary of the Basic Facts Proved on the Trial.

(1) John J. Casale Inc. owned a number of trucks, each housed every night after its run, in one of several

garages maintained by the Casale Company in New York City, three in Manhattan, two in Brooklyn, one in Long Island City.

(2) *Each* of the trucks, so returned to the garage *each* night was, *each* night—inspected, washed, gassed, greased, oiled, tested for tire, clutch, transmission, engine and electrical ignition trouble, had minor repairs done, was placed for easy egress in the morning—and supervised for proper starting in the morning—which was all done during the night time and the early morning hours by

(a) *Washers,*—who washed the trucks, inside and out (R. 299-301),

(b) *Floormen,*—who gassed the trucks, checked them in, shifted and placed them, cleaned the windshields and door windows, and made them ready for easy despatch in the morning (R. 293-299),

(c) *Greasers,*—who checked water and oil and tires, greased the trucks, oiled the generators (R. 307),

(d) *Night Mechanics,*—who inspected the trucks as they came in, tuned motors, fixed brakes and clutches and lights, straightened bumpers, and did other minor repairs, and inspected trucks that were going out of the state on long trips; their duties included standing by in the morning to supervise their going out and to help them get started in case starting trouble developed (R. 216, 222-223, 281-283, 288-289, 292, 424).

(3) At the 21st St. (Manhattan) garage, the Casale company housed many of its trucks; also it maintained there an overhaul shop, to which each truck (from all garages) was sent after it had gone 14,000 miles (R. 26,

215). Here were employed mechanics and mechanics' helpers (referred to hereafter as "daytime mechanics" as distinguished from the nighttime mechanics). These daytime mechanics did overhaul work. In addition, they performed the following duties:

(a) They did "road work"—that is, they were sent out on the road to repair trucks that had broken down. Included were repair jobs on trucks that had

(1) Broken down outside of New York State,—mostly in New Jersey

(2) Broken down at steamship piers or railroad yards, while delivering goods for out-of-State transshipment, or receiving goods originating out-of-State

(3) Come in from the Hoboken (N. J.) garage of the Casale company, for minor adjustments, made necessary because there was no mechanic at that garage.

(b) Two of the plaintiffs, speaking for the daytime mechanics, testified: one, that he went out on road calls to New Jersey *at least once a week* and as often as *four times a day* while at the same time he went out on road calls to steamship piers and freight yards at *least once a week* (R. 275): the other, that he went out on road calls to steamship piers and freight yards constantly, at *least once a week,* and sometimes *four times a day,* and on road calls to New Jersey, *as often as four times a day* (R. 217, 218): that the trucks on which they worked thus came from all of the Casale garages, not merely those that were housed at the 21st St. garage (R. 275).

(c) The daytime mechanics also did minor repairs on the Bethlehem Steel Co. trucks that came in from the Hoboken (N. J.) garage—sometimes two or three a day, sometimes five or six during the day (R. 219, 226, 228).

(d) Four times during the year, for a period of one month, these daytime mechanics were required to come in at 6 a.m. instead of 8 a.m., to supervise the starting out of the trucks from the 21st St. garage, of the trucks housed there, and to do any minor repairs required to get them started (R. 216, 217)—made necessary because "there were no night mechanics on from six to nine, and in case anything developed, you had to be there in order to take care of it" (R. 216).

(4) The work of the employees was performed on or directed to the trucks hauling goods in interstate commerce *during the course of each week* and in fact, *during the course of each day*:

(a) The washers did their work in pairs and they washed *each* truck *each* and every night (including all the trucks that during that day hauled goods in interstate commerce)—(R. 300).

(b) The floorman performed his work *on each and every one* of the trucks *each* night, (including all the trucks that during the day had hauled goods in interstate commerce)—(R. 294).

(c) The greaser did his work *"with respect to each vehicle"* and his task was a "continuous *day-to-day* maintenance of the vehicles"—(including all the trucks that during the day had hauled goods in interstate commerce)—(R. 421).

(d) The nighttime mechanic "did work on *all* the trucks" (R. 424) and he *inspected each truck as it came in* (R. 424): his duties required him to be present in the early morning hours to supervise the going out of the trucks, and to help get them started in case of difficulty (including the trucks that during the day had hauled goods in interstate commerce)—(R. 216).

(e) The daytime mechanics, in addition to their overhaul work, worked *each and every week* and sometimes *each and every day,* on trucks that at the time of repair was in actual haulage of goods for interstate commerce (see Paragraph 3-b *supra*).

(5) Of the plaintiffs concerned, two of each work category testified on the trial—and it was stipulated that the testimony of those who testified apply to all of the plaintiffs in the same categories (R. 219, 303-305, 310-312).

(6) The Casale company carried on its business with full knowledge that its trucks were being used for haulage of goods interstate, and derived its income and profits from a business that contemplated such interstate haulage of goods in its trucks:

(a) The contract between the Casale company and its customers provided (Plffs.' Ex. 2, Sec. 8):

> "VIII.—That the Lessor (Casale) shall at all times, and at its own cost and expense, have each vehicle registered, licensed and maintained in operating condition *to comply with all traffic and highway laws and/or regulations of the States of New York, New Jersey and Connecticut.*" (Emphasis supplied.)

(b) All gas used by the trucks was furnished by the Casale company at the garages: if a truck ran out of gas—which happened when the truck travelled long distances—the chauffeur would buy gas and pay for it, and Casale company would reimburse the chauffeur. Casale company kept a record of such reimbursements, and the records show that Casale made such reimbursements regularly and often for gas so *purchased in New Jersey and Connecticut* (R. 32-35, Plffs.' Exhibits 7 and 8).

(c) It maintained a regular day-by-day practice of sending its mechanics on "road calls" to New Jersey and Connecticut and to steamship piers and railroad yards, to repair trucks then engaged in haulage of goods in interstate commerce (see 3b, *supra*).

(d) The Casale company sent out a questionnaire to its customers to determine the extent to which the customers hauled their goods in the Casale trucks in interstate commerce, and as a result of the replies, *ascertained that their trucks were being used in interstate commerce to the extent of 23%* (R. 42, 43).

(e) The Casale company admitted to definite knowledge that *at least 34 of its 70 customers* were using the Casale trucks in haulage of goods *interstate* (R. 157-161).

(f) In a previous case in which the Casale company was involved, the Casale company admitted that the use of its trucks by its customers *in interstate haulage of goods was approximately 30%* (R. 155).

(7) The value, in dollars, of the goods that were hauled each week by customers of the Casale company in the Casale trucks, was considerable; and annually it ran into the millions:

(a) R. C. Williams Co., wholesale grocers, whose Casale trucks were housed at 21st St., Manhattan, sent *each week*, thirty truckloads of goods to its *New Jersey* customers in *Casale trucks*: weekly, this amounted to $50,000—and annually it amounted to $2,600,000.00 (R. 263).

(b) Hoffman & Mayer, dealers in poultry, whose trucks were housed at the 21st St., Manhattan garage, sent its Casale trucks to deliver to its *New Jersey customers several times a week*, amounting annually to $600,000.00 in value: In fact, it brought in its iced poultry from Delaware each morning, and instantly the poultry was transferred to the Casale trucks, thus constituting continuous interstate shipment, even to its New York City customers: accordingly, the Casale trucks were used 100% of the time in interstate commerce, and the annual value of its deliveries in the Casale trucks, inclusive of New York City, was between $3,000,000.00 and $5,000,000.00 (R. 249).

(c) Liggett Drug Co., whose Casale trucks were housed at 21st St., Manhattan, maintained a central warehouse in Manhattan, from which it delivered its goods, in Casale trucks, to its constituent stores: it sent the Casale trucks to its *New Jersey* stores *four times each week*, and to its *Connecticut* stores *twice a week*: the value of the goods hauled thus to these stores amounted annually to approximately $100,000.00; however,

because it maintained the warehouse for the purpose of servicing its constituent stores, haulage of their goods to their New York City stores was haulage in interstate commerce: on this basis, it used Casale trucks in interstate commerce 100% of the time, and the annual value of this haulage would be figured at $470,000.00 (R. 255-262, Plffs.' Ex. 15).

(d) Jacob Ruppert, brewers, whose Casale trucks were housed at the 93rd St. garage (Manhattan) sent at least 11 trucks *each day* to deliver goods to its *New Jersey* customers in Casale trucks; the annual value of goods so shipped amounted to approximately $1,000,000.00 (R. 246).

(e) Austin Nichols Co., importers and rectifiers of spirits, whose trucks were housed in the Brooklyn garage, used the Casale trucks to pick up *imports* at piers in New York and New Jersey, *"sometimes once a week, sometimes twice, and sometimes every day in the week"* (R. 91). Also the Casale trucks were used to make deliveries *in New Jersey and Connecticut,* once, twice or three times *each week.* The value of one truckload was $15,000. The annual value of goods merely delivered in the Casale trucks interstate in New Jersey and Connecticut was $1,000,000.00, not considering the value of goods picked up at the piers (R. 91, 116).

(f) J. M. Huber Co., whose Casale trucks were housed at the Brooklyn garage, were manufacturers of printing inks: its trucks were used 50% of the time, *week after week, daily,* making deliveries of its products in Casale trucks to New Jersey customers and to freight forwarders and railroad terminals for shipment extra-State (R. 103).

(g) V. LaRosa & Sons, manufacturers of macaroni, housed its Casale trucks at the Brooklyn garage, serviced 1,000 customers in New Jersey, and sent between five and fifteen Casale truckloads to New Jersey *each week*, on the average one or two truckloads *each day*: it also sent two truckloads to Pennsylvania *each week*: the annual volume of goods shipped interstate in Casale trucks was over $1,000,000.00 (R. 48).

(h) Dannemiller Coffee Co., coffee importers and roasters, housed its trucks in the Brooklyn garage. It used the Casale trucks to pick up green coffee at the piers; one truck was used *90% of the time* in picking up imports deliveries to railroad terminals were made *daily*: it was testified "There was *always* coffee on the piers and we could find a job for them (the Casale trucks)" (R. 73).

(i) Benjamin Dorman, wholesale grocers, housed the Casale trucks in the Brooklyn garage: it used the Casale trucks *daily* to pick up goods consigned to them from out-of-State at the Eastern District rail yards: carloads came in *twice a week*, and two or three truckloads came off each carload: the Casale trucks were also used to deliver to customers in New Jersey, two or three truckloads *each week*: the average truckload had a value of between $2,000.00 and $2,500.00 (R. 60).

(j) John Morrell & Son, branch house of the National Packing Company, housed the Casale trucks at the Brooklyn garage: 10% of its products processed in its Brooklyn plant was carried in Casale trucks to its customers in New Jersey and Connecticut: the Casale trucks were sent to New Jersey twice *each week* (R. 360).

(k) Pabst Sales Co., New York branch of the national brewery bearing the same name, shipped beer to the Pullman Company for use in Pullmans, 95% of which went interstate: Casale trucks were used three times *each week* to make these deliveries (R. 335).

(l) Atlantic Macaroni Co., manufacturers of macaroni products, housed the Casale trucks in the Long Island City garage: *each week* it sent two or three truckloads in Casale trucks to New Jersey: the goods thus shipped interstate in the Casale trucks had an annual value of $131,000.00 (R. 206).

(m) Jones & Laughlin Steel Service Co., housed its trucks at the Long Island City garage: Casale trucks were sent *each day* to its New Jersey customers; this company had a policy of servicing its customers within a 30 mile radius of New York City, which necessarily included much of New Jersey and Connecticut; this company used the Casale trucks to carry goods to railroad terminals of goods consigned to other out-of-State customers. It produced delivery receipts for a representative period August 1 to August 15, 1942—which showed 47 shipments to New Jersey customers of finished fabricated steel products, for a total of 77,000 pounds, shipments made in Casale trucks on 10 different days during a fourteen-day period (R. 231).

(n) Edw. & John Burke, Ltd., manufacturer of soft drinks, and exclusive sales agent of E. & J. Burke Ltd., brewers, used the Casale trucks to deliver its products to the Pullman Company, for use on the Pullman trains, using the Casale trucks two or three times *each and every week* for such

purpose (R. 164,—Plffs.' Ex. 11) and made similar deliveries in the Casale trucks to the Pennsylvania and New York Central Railroads, once or twice *each week* (R. 172).

(o) The above recitals are indicative of the general picture disclosing the interstate haulage of goods in the Casale trucks; the parade of Casale customers to the witness stand was halted on the insistence of defendant's counsel,—who, in order to bring this about,—consented to a stipulation that the haulage of goods in interstate commerce by the Casale trucks was substantial (R. 379, fol. 1137—Opinion of Court R. 489, fols. 1466-7).

(8) From the facts shown, it is clear that there was overwhelming proof that the Casale trucks hauled goods in interstate commerce regularly, each day or several times each week, and recurrently, each and every week, in very substantial volume.

(9) The record shows that many of the Casale company customers were engaged in production for commerce, thus affording the basis for a contention that the Casale employees were engaged in an occupation necessary for production for commerce, and therefore, covered by the Act, on the second ground of coverage,—*i. e.,* engaged in production for commerce; but neither in the District Court nor in the Circuit Court did plaintiffs make an issue of this, for coverage is so clear on the principle that the plaintiffs were engaged in commerce—that to assert additional coverage on the theory of production would be merely cumulative.

Questions Raised By Petitioner.

The first question propounded by Petitioner, although differenty phrased by petitioner's counsel, is

> If an employee shows that his work activity is so directly tied to interstate commerce as to be in contemplation of law a part of it—must the employee, in addition, show, by independent evidence, that, on some other theory, the employer is engaged in commerce, in order to be covered by the Fair Labor Standards Act?

The short answer is (a) this Court has time and again said "No" to the question and (b) there is and can be no divergence of opinion on the point in the Circuit Courts (see Point I, *post*).

The second question propounded by Petitioner, although differently phrased, is

> Where an employer is engaged in the business of generally maintaining and repairing vehicles used by other concerns in interstate commerce, may its employees working on such vehicles be deemed engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

The short answer is, that this Court has said "Yes" definitely to the exact question propounded, and has also answered the question in the affirmative by decisions closely analogous (see Point II, *post*).

The third question propounded by the Petitioner is

> May an employee recover under the Fair Labor Standards Act without showing that 'during any particular workweek he did actually perform his labor upon' trucks which hauled goods in interstate commerce?

The short answer to this question is (a) that there is no principle of law involved for the proof in the case

overwhelmingly shows that each employee continuously performed his work upon trucks which hauled goods in interstate commerce regularly, each and every week, indeed every day during the week, and recurrently, week after week, and (b) there is and can be no divergence of opinion in the Circuit Courts (see Point III, *post*).

POINT I.

It is well settled that it is enough if an employee, to be covered under the Fair Labor Standards Act, shows that his work activity is so closely tied to interstate commerce as to be in contemplation of law a part of it.

In a number of cases decided by this Court, it has been definitely decided that

(A) It is not necessary for an employee to show that the employer is engaged in commerce or in production for commerce, *aliunde* a showing that the employee himself is engaged in an activity closely connected with commerce or production for commerce and

(B) Where it is shown that an employee is engaged in commerce or in production for commerce—the employer is thereby deemed to be engaged in commerce or in production for commerce.

Kirschbaum v. *Walling*, 316 U. S. 517;
Warren Bradshaw Drilling Co. v. *Hall*, 317 U. S. 88;
Overstreet v. *North Shore Corp.*, 318 U. S. 125;
Pedersen v. *J. F. Fitzgerald Co.*, 318 U. S. 740;
Roland Electrical Co. v. *Walling*, 326 U. S. 657;
Martino v. *Michigan Window Cleaning Co.*, 325 U. S. 849.

The argument of Petitioner is the same that was used by the employer in the *Overstreet* case (*supra*)—the United States Circuit Court of Appeals (C. C. A. 5) holding with the employer (128 F. 2nd 450)—but on appeal to the Supreme Court, the argument being raised again, it was rejected.

In the *Kirschbaum* case, this Court ruled (316 U. S. 517, 524), that

> "To the extent that his employees are 'engaged in commerce or in production for commerce' the employer is himself so engaged."

The same precise question was raised in the New York State Courts in the case of *Pedersen* v. *J. F. Fitzgerald Co., supra* (see history recital of this case R. 558-562), and in those courts answered favorably to the employer —but the Supreme Court reversed the New York Court of Appeals, adverting to the *Overstreet* decision.

Petitioner cites the case of *Mabee* v. *White Plains Publishing Co.,* 327 U. S. 178—the case is not in point; all that was involved in that case was the question whether the *de minimis* doctrine was applicable to cases under the Fair Labor Standards Act.

On the question of conflict of decisions, the Petitioner has cited the case of *Lewis* v. *Florida Power & Light Co.,* 154 F. 2nd 751 (C. C. A. 5) as holding that an employee is bound to show that an employer is "engaged in commerce" regardless of other testimony that the employee's activity is so closely tied to commerce as to be in contemplation of law a part of it. The case does not so hold. The Circuit Court was merely passing on a finding of the District Court (based not upon a trial but upon pleadings and a stipulation which recited the business of the employer, ***but not the work activities of the employees***) that the stipulated facts did not show that the employer was engaged in commerce; the Circuit Court reversed the

District Court and held that some of the facts stipulated did in fact show the employer was engaged in commerce, and sent the case back for proof by the plaintiffs of the nature of their work.

The second case on the question of conflict, cited by Petitioner is *Wilson* v. *R. F. C.*, 158 F. 2nd 564—but the case is clearly not in point. The case is the simple case of an employee's activities being so remote from the commerce involved, that there was no coverage,—(*McLeod* v. *Threlkeld*, 319 U. S. 491—cited by that Court).

Clearly, then, there is no conflict on the point,—as indeed there cannot be, this Court having said the last word.

POINT II.

Plaintiffs working directly upon the vehicles that were used in interstate commerce regularly and recurrently—are engaged in commerce.

In the case of *Boutell* v. *Walling*, 327 U. S. 463, this Court held that employees of a company maintaining and repairing trucks used by another company to haul goods in interstate commerce were well within the coverage of the Fair Labor Standards Act.

In *Overstreet* v. *North Shore Corp.*, 318 U. S. 125, this Court held that employees of a toll road company, over which flowed vehicles, some of which later completed their journey by means of an interstate highway, were engaged in commerce within the meaning of the Fair Labor Standards Act.

Applying the theory of the *Overstreet* case, this Court in the *Pedersen* case, reversed a determination of the New York Court of Appeals (that a laborer employed by a contractor engaged in working on a right of way of a railroad, over which some trains ran interstate was not en-

gaged in commerce) and held that the laborer was engaged in commerce—although the contractor was an independent contractor, and did his work locally.

The *Pedersen* case is closely analogous to the instant case, because the employees in question performed their work on instrumentalities of commerce. The *Overstreet* case is likewise analogous, for the same reason—even more authoritative, because recovery there was accorded a toll road ticket taker, whose duties were not quite as closely related to commerce as were those of the repairman in the *Overstreet* case, and the maintenance employees in the instant case. *The Boutell case is practically on all fours with the instant case—there is hardly a semblance of difference between the underlying facts in the Boutell case and this case.*

POINT III.

The record contains overwhelming proof that each of the employees worked in interstate commerce each and every week regularly and recurrently.

There is really no law question involved here: the Petitioner asserts that (Petition, p. 10)

> "The record so clearly shows that * * * there was no inherent reason why as to any particular employee there should have been any interstate labor by him during any one or another of any particular week"

and further asserts that from the evidence adduced by the plaintiffs

> "It would not follow that any individual one of these suing employees even so much as touched in

> the course of any particular week any one or more vehicles so used in interstate commerce by some one or another lessee."

It is upon this assumption that the third question posed to this Court is predicated. But, the evidence is contrary to the assumed hypothesis—for the record is replete with evidence that *each* employee, *each night,* each week worked upon *all* the vehicles, those which that day were engaged in haulage of goods interstate as well as the others,—that many Casale trucks hauled goods interstate each day, week after week, regularly, recurrently—in tremendous volume: that at least 34 out of the 70 customers used Casale trucks to haul goods in interstate commerce: that the extent of the interstate commerce use of the Casale trucks was generally between 23% and 30% and in some cases 100%. The United States Circuit Court of Appeals for the Second Circuit was correct in holding that no quarrel can be had with the Trial Court in inferring that the employees spent a substantial amount of time on trucks used in interstate commerce.

Cases have been cited by Petitioner in an attempt to build an argument of conflict on the point. In the two cases cited, it was held merely that the suing employees spent time on interstate work "occasionally", "sporadically", and failed to produce proof as to when precisely they performed such work in commerce, making it impossible for the Trial Court to compute the amount of recovery.

In those cases, *Schwartz* v. *Witwer Grocer Co.*, 49 F. Supp. 1003 and *Super-Cold Southwest Co.* v. *McBride,* 124 F. 2d 90—the questions decided were purely procedural. No principle was cited that is in conflict with any principle of law applicable to the facts in the instant case.

CONCLUSION.

The Petition Should Be Denied.

Respectfully submitted,

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Of Counsel,
On the Brief.